

CALIFORNIA LAW REVISION COMMISSION

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July 9, 1993

<i>Date:</i>	July 22 & 23	<i>Place:</i>	Sacramento
	July 22 (Thursday) 10:00 am – 5:00 pm		State Capitol, Room 115
	July 23 (Friday) 9:00 am – 4:00 pm		State Capitol, Room 113
<p>Changes may be made in this agenda, or the meeting may be rescheduled, on short notice. If you plan to attend the meeting, please call (415) 494-1335 and you will be notified of any late changes.</p> <p>Individual items on this agenda are available for purchase at the prices indicated or to be determined. Prices include handling, shipping, and sales tax. Orders must be accompanied by a check in the correct amount made out to the "California Law Revision Commission".</p>			

FINAL AGENDA*for meeting of the***CALIFORNIA LAW REVISION COMMISSION****Thursday, July 22, 1993****1. MINUTES OF MAY 13-14, 1993, MEETING**

(sent 6/21/93)

2. ADMINISTRATIVE MATTERS**Election of Officers for 1993-94**

Memorandum 93-38 (NS) (sent 6/10/93) (\$5.50)

Budget, Personnel, Consultants, and Related Matters

Report by Executive Secretary

Communications from Interested Persons**3. LEGISLATIVE PROGRAM**

Memorandum 93-34 (NS) (to be sent)

4. STUDY F/L-521.1 – EFFECT OF JOINT TENANCY TITLE ON COMMUNITY PROPERTY

Draft of Recommendation

Memorandum 93-35 (NS) (enclosed)

5. STUDY L-3044 – COMPREHENSIVE POWERS OF ATTORNEY STATUTE

Work in Progress

Memorandum 93-20 (SU) (sent 5/12/93) (\$25.00)

Note. We will continue consideration of the draft statute with §8238 on page 27.

Friday, July 23, 1993

6. STUDY N-201 – JUDICIAL REVIEW OF AGENCY ACTION – STANDING AND TIMING

Draft of Initial Decisions

Memorandum 93-22 (NS) (sent 3/11/89) (\$8.50)

7. STUDY N-202 – JUDICIAL REVIEW OF AGENCY ACTION – SCOPE OF REVIEW

Draft of Initial Decisions

Memorandum 93-31 (NS) (sent 4/30/93) (\$8.50)

First Supplement to Memorandum 93-31 (sent 5/11/93) (\$8.50)

7/9/93

CALIFORNIA LAW REVISION COMMISSION
MEETING SCHEDULE

July 1993

Sacramento

July 22 (Thur.)

10:00 am – 5:00 pm

July 23 (Fri.)

9:00 am – 4:00 pm

September 1993

Sacramento

Sep. 23 (Thur.)

10:00 am – 5:00 pm

Sep. 24 (Fri.)

9:00 am – 4:00 pm

November 1993

Los Angeles

Nov. 18 (Thur.)

10:00 am – 6:00 pm

Nov. 19 (Fri.)

9:00 am – 4:00 pm

MINUTES OF MEETING
CALIFORNIA LAW REVISION COMMISSION
JULY 22-23, 1993
SACRAMENTO

A meeting of the California Law Revision Commission was held in Sacramento on July 22-23, 1993.

Commission:

Present: Arthur K. Marshall, Chairperson
Sanford Skaggs, Vice Chairperson
Daniel M. Kolkey
Edwin K. Marzec
Forrest A. Plant
Colin Wied

Absent: Christine W.S. Byrd
Terry B. Friedman, Assembly Member
Bion M. Gregory, Legislative Counsel
Bill Lockyer, Senate Member

Staff:

Present: Nathaniel Sterling, Executive Secretary
Stan Ulrich, Assistant Executive Secretary

Absent: Robert J. Murphy, Staff Counsel

Consultants:

Michael Asimow, Administrative Law (July 23)
Jerry Kasner, Community Property (July 22)

Other Persons:

Herb Bolz, Office of Administrative Law, Sacramento (July 23)
William M. Chamberlain, California Energy Commission, Sacramento (July 23)
Karl Engeman, Office of Administrative Hearings, Sacramento (July 23)
Jeffrey Fine, Unemployment Insurance Appeals Board, Sacramento (July 23)
Don E. Green, State Bar Estate Planning, Trust and Probate Law Section, Sacramento (July 22)
Robert Hargrove, Legal Section, Department of Motor Vehicles (July 23)
Bill Heath, California School Employees' Association, San Jose (July 23)
Maurine Padden, California Bankers Association, Sacramento (July 22)
Kenneth G. Petrusis, Probate, Trust and Estate Planning Section, Beverly Hills Bar Association, Beverly Hills (July 22)
Thomas J. Stikker, Executive Committee, State Bar Estate Planning, Trust and Probate Law Section, San Francisco (July 22)

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MINUTES OF MAY 13-14, 1993, COMMISSION MEETING

The Commission approved the Minutes of the May 13-14, 1993, Commission meeting with the following changes:

On page 4, lines 4-5, the words “with community property under the transmutation” were deleted.

On page 8, line 12, the word “asking” was replaced by the words “the Commission asks”.

On page 8, line 15, the words “study authority of” were replaced by the words “authority to study”.

ADMINISTRATIVE MATTERS

Election of Officers for 1993-94

The Commission considered Memorandum 93-38, relating to election of Commission officers for 1993-94. The Commission elected Sanford Skaggs to be Chairperson and Daniel M. Kolkey to be Vice Chairperson for the term commencing September 1, 1993.

Budget

The Executive Secretary reported that the Commission’s 1993-94 budget was approved by the Legislature as proposed by the Governor, less 15%, reflecting a general 15% reduction in state operations. The Commission’s budget received wide-ranging support from the State Bar, various interest groups, and other expected and unexpected sources; the full extent of the input is unknown. The Commission asked the staff to make a record of the known contacts in case the need should arise in the future.

The Commission has anticipated the 15% reduction by reducing the Commission’s meeting schedule, reducing the time base of a staff attorney, and waiving Commissioner compensation, among other economies. Although there

will be no new funds for printing reports or retaining research consultants in the reduced budget, we have managed with savings from the 1992-93 fiscal year to encumber funds for both these purposes.

Personnel

The Executive Secretary reported that processes are underway to hire an attorney half-time to replace Pamela Mishey, who was unable to work on a reduced time base. We have received about 25 applications for the position, including applications from a number of very well qualified attorneys. We hope to be in a position to make a hiring decision in about a week.

Consultants

The Executive Secretary reported that we managed to save sufficient funds during the 1992-93 fiscal year that at the end of the year we were able to make the following consultant contracts:

<u>Subject</u>	<u>Consultant</u>	<u>School</u>	<u>Due Date</u>
Administrative Law	Prof. Michael Asimow	UCLA	Travel 1993-4
Unincorporated Ass'ns Corporation Law	Prof. Michael Hone	USF	December 1993
	Prof. Mel Eisenberg	Boalt	September 1994
Unfair Business Practice	Prof. Bob Fellmeth	USD	December 1994

These contracts do not necessarily determine the Commission's priorities for the coming year or two, and the staff will present a memorandum on priorities at the September meeting.

1993 LEGISLATIVE PROGRAM

The Commission considered Memorandum 93-34, along with an updated status report distributed at the meeting (copy attached as an Exhibit), relating to the 1993 Commission legislative program. The amendments described in the memorandum were acceptable to the Commission.

STUDY F-521.1 – EFFECT OF JOINT TENANCY TITLE ON MARITAL PROPERTY

The Commission considered Memorandum 93-35 and the attached draft of a recommendation relating to the effect of joint tenancy title on marital property. The Commission directed the staff to prepare a revised recommendation that includes the following changes.

Civ. Code § 683 (amended). Creation of joint interest

This section should be revised to eliminate the overlap between (a)(1) and (a)(2), perhaps by combining them with a phrase such as “including, but not limited to”.

§ 861. Marital property presumption notwithstanding joint tenancy title

This section was revised to state that separate property is presumed to remain *separate property*, subject to commingling and other principles. The Commission discussed, but did not resolve, the possibility of stating Sections 861 and 862 as a rule of law rather than as a presumption subject to rebuttal.

§ 863. Information concerning form of title

This section was deleted. The staff should prepare a draft of a provision that is exculpatory in character, along the lines that a person who gives the statutory form incurs no liability thereby, although the giving of advice beyond the form may incur liability for the consequences of the advice.

§ 864. Statutory form

The notice should be redrafted for simplicity and clarity. This might be done by tabular statements of treatment of community property, separate property, or joint tenancy for each purpose. Other suggestions were that statements of principle be made more general and less precise, or that the notice summarize the consequences of each form of tenure. Perhaps only the salient points could be addressed, such as tax consequences. The form might start with a question such as, “Do you want to give up your community property and separate property rights? By signing this statement you will no longer have community property and you will give up half your separate property. Some of the rights you will lose are summarized below. If you want community property, you should not sign this form but should take title as community property.”

§ 868. Transitional provision

The Commission discussed making the recommendation retroactive to January 1, 1985, but concluded the complexities were too great and it should be prospective only.

STUDY L-521.1 – EFFECT OF JOINT TENANCY TITLE ON MARITAL PROPERTY
See Study F-521.1.

STUDY L-3044 – POWER OF ATTORNEY STATUTE

The Commission completed its consideration of Memorandum 93-20 concerning revision of the power of attorney statutes, and also considered the First Supplement to Memorandum 93-20, distributed at the meeting. The staff will present a revised statute in the form of a draft tentative recommendation for consideration at the next meeting, with the goal of distributing the tentative recommendation as revised for comment in time to recommend legislation to the 1994 legislative session.

The Commission made the following decisions:

§ 8238. Duty to reveal capacity as attorney-in-fact

This section should be deleted from the power of attorney statute. As a result, the general rule in Civil Code Section 2322 will apply, pursuant to draft Section 8051.

§ 8239. Attorney-in-fact's duties on termination of authority

This section should be reviewed by the staff and revised to make clear which priorities apply when there is no successor attorney-in-fact or where the principal is incapacitated. As a starting point, subdivision (a) should be revised as follows:

8239. (a) On termination of an attorney-in-fact's authority, the attorney-in-fact shall promptly deliver possession or control of the principal's property in the following order of priority:

- (1) To a qualified successor attorney-in-fact, if any.
- (2) If there is no qualified successor attorney-in-fact, to the principal or as directed by the principal, if the principal is not incapacitated.
- (3) ~~If the principal is incapacitated, to~~ To the principal's spouse, as to any community property.
- (4) ~~In the case of a nondurable power of attorney where the principal has become incapacitated, to~~ To the principal's conservator of the estate or guardian of the estate.
- (5) In the case of the death of the principal, to the principal's personal representative, if any, or the principal's successors.

§§ 8261-8264. Authority of attorneys-in-fact

These sections should be reorganized and redrafted. The section fleshing out the meaning of a grant of general authority (draft Section 8263) should be set forth first, followed by a section combining draft Sections 8261 (attorney-in-fact has authority granted in power of attorney, by statute, and authority incidental,

necessary, or proper to carry out conferred authority) and 8264 (grant of general authority for express subjects and purposes).

The word “conferred” in Section 8261 should be changed to “granted” for consistency with other sections.

§ 8266. Excluded authority

The Commission declined to eliminate the rule forbidding an attorney-in-fact to make or change the principal’s will.

§ 8301. Reliance by third person on general authority

The word “freely” in the clause a “third person may freely rely on, contract with, and deal with...” should be deleted.

§ 8303. Affidavit of lack of knowledge of termination of power

§ 8304. Reliance on attorney-in-fact’s affidavit

These sections do not appear to be consistent: the effect of the affidavit under Section 8303 (from the Uniform Durable Power of Attorney Act) applicable in cases of termination of the power is seemingly greater than the effect of the affidavit under Section 8304 applicable generally. The conflict between these two sections should be reconciled, perhaps by combining them into one general affidavit provision, with special provisions concerning termination and revocation.

§ 8900. Legislative intent

This section should be revised:

8900. A power of attorney is exercisable free of judicial intervention, subject to the ~~jurisdiction of the courts of this state invoked pursuant to this title or otherwise invoked pursuant to law~~ this title.

§ 8904. Jury trial

The Commission considered the points raised in the First Supplement to Memorandum 93-20 concerning the right to a jury trial and decided to retain this section providing that there is no right to a jury trial in proceedings under the power of attorney statute.

§ 8921. Jurisdiction over attorney-in-fact

The staff should review this section to make sure that it does not result in limiting the jurisdiction of California courts.

§ 8923. Venue

This section should be revised to adopt venue rules patterned on the rules applicable to proceedings involving conservators.

§ 8940. Petitioners

For further consideration, the list of permissible petitioners should include a third person who is being asked to deal with an attorney-in-fact, any interested person, such as relatives and friends, by analogy with Probate Code Section 1820 concerning conservatorship petitions.

§ 8945. Notice of hearing

The 30-day notice period should be changed to 15 days for consistency with the conservatorship provisions.

STUDY N-201 – JUDICIAL REVIEW OF AGENCY ACTION: STANDING AND TIMING

The Commission considered Memorandum 93-22 and the attached staff draft of initial policy decisions on standing and timing issues in judicial review of agency action. The Commission made the following decisions concerning the draft.

§ 651.010. Applicability of chapter

Reference should be made to a “judicial proceeding” rather than “civil action”, subject to the staff checking the Code of Civil Procedure to see whether the definitions of that code might be applicable to the Government Code. Alternatively, the issue might be addressed in the Comment.

§ 651.020. Exclusive agency jurisdiction

The language in the Comment relating to authority of the court to dismiss or retain jurisdiction should be moved into the section itself. The language in the comment relating to review “by the court” should be rephrased to refer to “judicial review” in this section and throughout the draft.

§ 651.030. Concurrent agency jurisdiction

Subdivisions (a) and (b) should be combined for clarity and ease of understanding.

§ 652.130. Finality

The language in the statute relating to agency action “reasonably believed” to be intended as final, and the corresponding discussion on the Comment, was deleted. The Comment should note that the section replicates existing law stated in Code of Civil Procedure Section 1094.5.

This section should be preceded by one similar to 1981 Model State APA § 5-102(a), listing or cataloguing the prerequisites for judicial review of agency action.

§ 652.140. Ripeness

This section was deleted. The general index or cross-reference section on requirements for judicial review should simply refer to “ripeness” without further elaboration. The Comment should note that case law ripeness limitations are incorporated. If in the process of redrafting the staff is able to develop an adequate ripeness provision, this should be presented as an alternative draft.

§ 652.150. Exemption to finality and ripeness requirements

Language should be added to this section requiring as a condition of granting judicial review “that the issue is fit for immediate judicial review”. The Comment should explain that this means that the issues presented are questions of law that the court feels can be decided in the abstract. Professor Asimow undertook to write language for the Comment distinguishing fitness from ripeness. In the Comment the “cf.” was deleted from the reference to *Abbott Laboratories*.

§ 652.210. No standing unless authorized by statute

The word “by” was inserted in the last line of the section — “expressly provided by statute”.

§ 652.220. Party to state adjudicative proceeding

This section, requiring that a person must have been a party to obtain judicial review, was approved as drafted. It should be emphasized that a special statute, such as that applicable to the Coastal Commission, will control over this section by reason of the overriding provision of Section 652.210. The Comment should

note that the section is limited to adjudications under the state administrative procedure act.

§ 652.230. Participant in administrative proceeding

This section, allowing standing to obtain judicial review in case of participation in an administrative proceeding, should be limited to review of decisions in adjudicative proceedings other than proceedings under Section 652.220. In addition, the requirements of Section 652.240 (private interest standing) or Section 652.250 (public interest standing) should be met before a person has standing under this section. Whether this would be a limitation on special statutes that are potentially broader, similar to that of the Coastal Commission, is reserved for future decision in the process of reviewing conflicting statutes.

§ 652.240. Private interest standing

This section, allowing standing to obtain judicial review of agency action that prejudices a person, should be limited to rulemaking or agency action other than administrative adjudication, unless both this section and Section 652.230 are satisfied. The section should require that a person be “adversely affected” rather than “prejudiced”.

The section should also require that, in the case of a rulemaking proceeding:

(1) A judgment in favor of the person would “tend” substantially to eliminate or redress the prejudice to that person caused or likely to be caused by the agency action. See 1981 Model State APA §5-106(a)(5)(iii).

(2) The person’s asserted interests are among those the agency was required to consider when it engaged in the agency action being challenged.

§ 652.250. Public interest standing

This section, allowing standing to obtain judicial review of agency action affecting the public interest, should be limited to rulemaking or agency action other than administrative adjudication, unless both this section and Section 652.230 are satisfied.

Subdivision (a) should incorporate a germaneness requirement, parallel to that in Section 652.240.

In the Comment, the word “waste” was deleted from the second paragraph.

§ 652.260. Third party standing

This section was deleted.

§ 652.310. Exhaustion required

Reference should be made in this section to an agency whose action is “to be” rather than “being” reviewed.

§ 652.320. Administrative review of final decision

This section should be revised so it does not permit a person to seek judicial review if the person has allowed a proposed decision to become final without seeking an available higher level hearing within the agency; it is only the rehearing opportunity that a person is not required to exhaust. The last clause of the section should refer to a statute or regulation that requires “a petition for” reconsideration, rehearing, or other administrative review.

§ 652.330. Inadequate remedy and irreparable harm exceptions

The material in the Comment elaborating the exceptions to the exhaustion requirement should be moved to the statute text. An exception should be added for a showing that the agency lacks subject matter jurisdiction.

The discussion in the Comment on broadening the case law irreparable harm exception should be deleted. We do not intend to broaden the existing narrow exception. Discussion of the private benefit derived from requiring exhaustion might be elaborated.

§ 652.340. Statutory excuse

This section was deleted.

§ 652.350. Interim review of prehearing determination

The reference to “other prehearing activity” was deleted from this section.

§ 652.410. Statute of limitations for review

This section should be recast so it parallels the procedure on appeals — there would be a relatively short period (e.g. 30 days) within which to file a notice of appeal and request a transcript, with possibly an additional 15 days for the transcript request; pleadings would not be required until some time after delivery of the transcript (e.g. 60 days). The statute should be clear that the time for seeking judicial review is extended during any period when reconsideration

is sought or is occurring. There should be no limitations period for compelling an agency to issue a decision when it has failed to do so.

The Comment should make clear that existing law is preserved distinguishing between quasi-judicial and quasi-legislative agency action.

§ 652.510. Exact issue rule

The statutory exceptions to the exact issue rule should be restated from 1981 Model State APA §5-112, rather than developed in the Comment.

Code Civ. Proc. §526a. Taxpayer actions

This section should be repealed only to the extent its coverage is superseded by the standing provisions of the administrative procedure act.

Gov't Code § 649.120. Form and contents of decision

It was noted that the draft of Section 649.120 in this memorandum is based on an earlier version of the section, and the current version is set out in the Commission's tentative recommendation on administrative adjudication.

STUDY N-202 – JUDICIAL REVIEW OF AGENCY ACTION: SCOPE OF REVIEW

The Commission considered Memorandum 93-31 and the attached staff draft of initial policy decisions on scope of judicial review of agency action. The Commission made the following decisions concerning the first 5 pages of the draft.

§ 652.520. Agency record for judicial review

Subdivision (b)(3) should be expanded to include as part of the agency record a transcript of any hearing, if one was maintained, or minutes of the proceeding. In the case of electronic recording of proceedings, the statute should track the procedure in civil appeals where audio or video recording was used at trial. Also included in the record should be all material submitted to the agency in connection with the agency action.

Subdivision (c) should be reviewed in light of civil appellate practice, which enables the parties to limit the record or develop an agreed statement of facts.

§ 652.530. New evidence on judicial review

Subdivision (a) should be revised to permit the court, in its discretion, to hear new evidence itself without remanding to the agency in cases of adjudicative

proceedings where the standard of review is the independent judgment of the court.

§ 652.540. Standards of review of agency action

The last clause — “as applied to the agency action at the time it occurred” — was deleted.

§ 652.550. Review of agency interpretation of law

The provision in subdivision (a)(4) that mixed questions of law and fact are treated as questions of fact was deleted. Professor Asimow offered language for possible inclusion in the Comment treating the issue of classification of questions of law and fact.

Subdivision (b), providing an independent judgment standard for review of agency interpretation of law, should be recast in a manner similar to that used in appellate review of civil judgments. The phrase “whether the agency action is supported by the weight of the evidence” was deleted.

Subdivision (c), referring to delegation of a determination to an agency, should be limited to formally adopted agency action such as a rule or precedential decision.

- APPROVED AS SUBMITTED
- APPROVED AS CORRECTED
(for corrections, see Minutes of next meeting)

Date

Chairperson

Executive Secretary

STATUS OF 1993 COMMISSION LEGISLATIVE PROGRAM
(as of July 21 1993)

AB 209 (Horcher): Deposit of Estate Planning Documents
 AB 1137 (Knight): Parent and Child Relationship for Intestate Succession
 AB 1500 (Speier): Family Code Cleanup
 AB 1704 (Horcher): Litigation Involving Decedents Cleanup

AB 2211 (Assembly Judiciary): Maintenance of Codes [includes 3 CLRC technical revisions]
 SB 305 (Lockyer): Special Needs Trust Cleanup
 SCR 4 (Senate Judiciary): Continuing Authority to Study Topics [includes 3 new topics]

Bill Status		AB 209	AB 1137	AB 1500	AB 1704	AB 2211	SB 305	SCR 4
Introduced		Jan 25	Mar 2	Mar 4	Mar 4	Mar 5	Feb 17	Jan 7
Last Amended		July 13	June 28	June 17	—	June 24	May 26	—
First House	Policy Committee	Apr 20	May 12	Apr 27	May 19	May 27	May 25	Feb 9
	Fiscal Committee	May 19	—	May 26	—	—	Jun 14	Mar 1
	Passed House	May 27	May 28	June 1	May 27	June 3	June 17	Mar 4
Second House	Policy Committee	July 13	[Aug 17]	June 29	June 22	July 13	[Aug 18]	Apr 29
	Fiscal Committee		—	July 12	—	—		May 19
	Passed House			July 15	July 2			May 27
Concurrence				July 16	—			—
Governor	Received			July 20	July 8			—
	Approved				July 19			—
Chaptered by Secretary of State	Date				July 19			June 2
	Chapter #				151			Res 31

• Unless otherwise noted, all dates are in 1993.

[date]: scheduled

—: not applicable